

SPECIAL BOARD OF ADJUSTMENT NO. 280

**PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) TO
DISPUTE) ST. LOUIS SOUTHWESTERN RAILWAY COMPANY**

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when K. J. Serene was unjustly dismissed from service and was not given a fair and impartial hearing.

2. Claimant Serene shall now be reinstated to service with all seniority rights unimpaired, paid for all lost wages and his record cleared of the related charges." (55W-D-1217-Serene; 53-904)

OPINION OF BOARD:

Claimant, an Assistant Foreman with approximately five years of service at the time of the incidents in this case, was withheld from service effective January 17, 1986 pending investigation of a Rule G violation. After investigation ultimately held on March 25, 1986, and by letter dated March 31, 1986, Claimant was dismissed from service.

After being withheld from service on October 16, 1985 as a result of an alleged Rule G violation, Claimant entered a drug rehabilitation program on the following day and was released from the program on November 5, 1985. On November 12, 1985, Claimant was returned to service on a conditional basis after signing an agreement that provided that he must totally abstain from alcohol and other drugs; participate in a rehabilitation program and attend AA and/or DA meetings; submit to random unannounced alcohol and/or drug tests and refrain from failing to protect his assignment. The agreement further provided that "Any violation of the above may result in termination of your employment."

On January 10, 1986, Claimant was asked and agreed to submit to a urine test for drugs. Although Claimant denied usage of marijuana since October 17, 1985, the Thin

Layer Chromatography screen showed a positive presence of cannabinoids and the Gas Chromatography/Mass Spectrometry test placed the cannabinoids level at 96 ng/ml.

The Organization argues that there is no evidence of a Rule G violation showing that Claimant engaged in the use of drugs while subject to duty or was impaired or under the influence thereof. The Organization asserts that expert opinion disputes the Carrier's assertion (which is also based upon expert opinion) that a level of greater than 50 ng/ml indicates a recent usage of marijuana.

In this case we are governed by the terms of the conditional return to work agreement signed by Claimant. Claimant agreed that he would "*totally* abstain from alcohol and other drugs" [emphasis added]. Whether or not Claimant "*totally*" abstained is, for our purposes, governed by our limited review capacity that requires the Carrier to demonstrate that its actions and conclusions were supported by substantial evidence in the record. We are not permitted to review the facts on a de novo basis. See Special Board of Adjustment 280, Award 220.

We find that the Carrier's burden in this regard has been met. The Carrier has demonstrated the results of tests and has backed up its conclusions with medical support. Because Claimant denied usage or because the Organization cites us to medical evidence or opinion to the contrary does not show that the Carrier was without substantial evidentiary support for its conclusion that Claimant did not live up to the specific terms of the conditional return to work agreement.

Nevertheless, we are troubled by the fact that upon his completion of the rehabilitation program, Claimant was not tested. While we cannot say that the absence of such a test upon completion of the program sufficiently detracts from the the Carrier's substantial evidence showing that discipline was warranted so as to require a full sustaining award, we can consider the absence of such a test under the circumstances of this case to determine whether the amount of discipline imposed was arbitrary or capricious so as to amount to an abuse of discretion. Such a test would have given a more accurate measuring

point to determine the validity of Claimant's assertions that he did not use marijuana subsequent to being in the rehabilitation program. Therefore, we conclude that under the circumstances of this case, dismissal was too harsh a disciplinary action and Claimant shall be returned to service with seniority and other benefits unimpaired but without compensation for time lost. Return to service is conditioned upon successful completion of a return to service physical examination including testing for drugs.

AWARD:

Claim sustained in accordance with opinion. Claimant shall be returned to service with seniority and other benefits unimpaired but without compensation for time lost. Return to service is conditioned upon successful completion of a return to service physical examination including testing for drugs.


Edwin H. Benn, Chairman
and Neutral Member


R. O. Naylor
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
November 24, 1987